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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. SHELLEY BERNICE KENEFICK, Defendant and Appellant.	C055070 (Super. Ct. No. LF008862A)

APPEAL from the judgment of the Superior Court of San Joaquin County. Richard M. Mallett, Judge. Affirmed as modified.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez and Catherine G. Tennant, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I, II, and III of the Discussion.

Defendant was convicted by jury of 18 counts of theft, burglary, selling securities by false statement, and forgery, with an aggravated white collar crime enhancement, and enhancements for taking property in excess of $150,000 in value, after she stole $890,000 from six victims, some elderly, while purporting to run an investment company. Sentenced to 16 years 4 months in prison, she appeals. She contends there is insufficient evidence to support three counts; the trial court erred in permitting a forensic accountant to testify that defendant ran a Ponzi scheme; two of the forgery counts should be vacated and the sentence on the remaining forgery counts should be stayed.

We find merit only in the last two contentions relating to the forgery counts. Multiple forged signatures on a single document constitute but one count of forgery. Two counts of forgery must be vacated. The sentence on the remaining forgery counts is stayed pursuant to Penal Code section 654 because the forgeries were part of a single course of action with a single intent. In all other respects, we affirm the judgment.

FACTS

Defendant's Scheme

Defendant had a business doing bookkeeping and tax returns. In 1999, she started Kenefick Investments. Beginning in 2000, six people, who were clients and friends, invested $890,000 in Kenefick Investments based on defendant's representations that she was going to invest in various real estate or business projects, including first deeds of trust. Some of the investors

received promissory notes and one received deeds of trust that were forged. By August 2005, defendant stopped making payments to her investors and some of them went to the police.

Sue Tankersley, an investigative auditor with the Department of Justice, traced over 90 percent of the money invested and determined none of it was invested in real estate. Much of it went to defendant's personal account; defendant used the money to pay down personal lines of credit and to make payments to the Kenefick Ranch account, World Access Communications, and her husband's welding business. Some of the money was used to pay other investors. Instead of an investment company, Tankersley explained, defendant ran a Ponzi scheme, using new money to pay off old investors. The investors' money was not invested as promised. Any payments they received came from no source other than the victims themselves.

Howard Transactions

Donald Howard had known defendant for 12 years. She did his accounting and they socialized; their families went on camping trips together. On one of these trips, around the campfire, defendant mentioned investing. Howard had some IRA's for retirement; they were invested in CD's and getting only one or two percent interest. He mentioned to defendant that he would like to do something else, but he did not want to lose any money as he planned to live on the interest in retirement.

Howard was interested only in first deeds of trust; he told defendant she would not be interested because there was nothing in it for her. Defendant said she would charge a loan fee,

collect payments and handle any foreclosure details. Defendant told Howard she had a friend who wanted to borrow $100,000; he would give a first deed of trust on his house, which was worth $250,000. Howard would receive 10 percent interest; defendant guaranteed he would be paid even if the borrower failed to make payments. Howard believed defendant as she was his accountant and friend.

In June 2001, when Howard was 64 years old, he invested $60,000 in Kenefick Investments. He believed he was entering a partnership with defendant, who was also investing $60,000. In return Kenefick Investments received a promissory note for $120,000, secured by a first deed of trust on property on Spy Glass Court in Woodbridge, owned by Dennis and Susan Cunningham. Defendant told Howard it was not necessary for him to go to the title company; she would handle everything and bring him the papers to sign.

The Cunninghams did not borrow the money; their signatures on the note and deed of trust were forged.

Howard received interest payments of $500 per month on his investment. In December 2001, after Howard had turned 65, defendant offered him another investment opportunity. She had a friend who wanted to borrow $100,000 and would give a first deed of trust on his house on Wild Plum Way in Tracy worth $250,000. The interest rate would be 10 percent. Howard invested $100,000 from savings and received a promissory note in the amount of $100,000 from Kristina and Alexander Brachna, secured by a deed of trust.

Kristina Brachna and her husband Alejandro Gonzales had lived on Wild Plum Way; they had purchased the house with a loan from Wells Fargo Bank. They did not sign the Howard documents.

Howard continued to receive interest checks on his two investments with Kenefick Investments until August or September 2005, when a $500 check bounced. Defendant's secretary told him to redeposit it, but when he tried he was told the account was closed. He could not get in touch with defendant. He contacted Brachna who told him he did not have a deed of trust on her house. When Howard confronted defendant, she tried to convince him the documents were not false. Howard invested $160,000 and received some interest but none of his principal back.

In connection with these transactions, the jury convicted defendant of first degree burglary (Pen. Code, § 459) with a finding that the offense was violent because Howard was present (Pen. Code, § 667.5(c)(21) (count 3), theft from an elder (Pen. Code, § 368, subd. (d)) and grand theft (Pen. Code, § 487, subd. (a)), with findings that defendant took property exceeding $150,000 in value (Pen. Code, § 12022.6, subd. (a)(2)) (counts 4 and 5), sale of securities by false statements (Corp. Code, § 25401) (count 6), and four counts of forgery (Pen. Code, § 470, subd. (a)) (counts 9, 10, 17 and 18).

Brachna Transactions

Defendant did accounting work and taxes for Kristina Brachna, whose signature defendant forged on one of the notes given to Howard. Brachna had an inheritance invested with Edward Jones. Defendant mentioned her investment company. Defendant told Brachna she would receive 10 percent interest only for three years. Defendant would get two percent and manage the investment. Brachna had no concern about risk because she trusted defendant.

Brachna invested $80,000 in June of 2001 and another $85,000 the following April. Brachna received promissory notes from Kenefick Investments. At one point, Brachna asked for $10,000 of her principal back. It took awhile, but in June 2005, she received it. About that time, it became more difficult to get her monthly interest payments. In August, Howard called about the deed of trust. Brachna felt "like my world just dropped out. I kind of knew from that point that we were screwed." When Brachna went to see defendant to get her money, defendant gave her a sob story.

The jury convicted defendant of grand theft with an enhancement of taking property with a value exceeding $150,000 (count 7) and sale of securities by false statement (count 8).

Valencia Transaction

Carolyn Valencia owned duplexes and defendant provided her accounting and tax services. After Valencia's husband died, she had $40,000 to invest. She spoke with defendant about investing in a housing development. Defendant told Valencia she would

receive a monthly check of “free” money that she would not have to declare on her taxes. Valencia gave defendant $40,000 in February 2000, and received a promissory note. Valencia received about $300 per month until January 2002, when she got some of her principal back. Then her monthly payments were about $250 per month. They continued until June 2005; after that she could not reach defendant.

The jury convicted defendant of sale of securities by false statement (count 15) and grand theft (count 16).

Kosta Transactions

The investor who lost the most was Nick Kosta; he lost $275,000. Defendant had provided him tax services since 1999. In January 2003, when Kosta was 68 years old, he invested $45,000 with Kenefick Investments for a housing development in Ripon. Defendant told him she knew a policeman who had inherited a house and wanted to get some money out; Kosta would get a first deed of trust securing the loan. He invested $85,000. Kosta did not receive any paperwork, but trusted defendant.

Defendant told Kosta he should invest in a Franklin money account. He did so and gave defendant deposit slips for that account. Kosta’s wife, who had dementia, invested another $85,000 with defendant. After his wife’s aunt died, Kosta transferred money from the Franklin account to an account at Edward Jones. His wife then wrote two checks to Kenefick Investments, for $20,000 and $40,000 from the Franklin account without his knowledge. Defendant told Kosta that Edward Jones

had invested the $60,000. When Kosta spoke to the representative at Edward Jones, he was told there had been no investment. The $60,000 had been withdrawn from the Franklin account and the money had to be transferred back to Franklin to cover the checks. Mrs. Kosta was uncertain about the investments. Kosta went to the police.

The jury convicted defendant of theft from the elderly, with an enhancement for taking property with a value exceeding $150,000 (count 1) and sale of securities by false statement (count 2).

Allen Transactions

Defendant provided accounting and tax services for Colleen Allen from 1998 through 2003. Allen's grandmother died and left her an inheritance. Defendant had an investment business and told Allen she could invest in properties and receive 10 percent interest. Allen was completely relying on defendant; they did not discuss risk and Allen believed the investment was safe with a small risk of loss.

In June 2003, Allen made three investments of $40,000, $60,000 and $100,000. She received promissory notes from Kenefick Investments. There was a six-month delay in investing the funds. Allen was somewhat concerned, but she trusted defendant. She received payments when she asked for them. The interest was to go into a fund for payment of Allen's quarterly taxes. Allen's quarterly taxes were not paid and defendant went out of business. Allen never got her principal back and could not reach defendant.

The jury convicted defendant of grand theft with an enhancement for taking property valued in excess of $150,000 (count 11) and sale of securities by false statements (count 12).

Munoz Transaction

Gabriela Munoz owned a roofing business with her husband. Defendant was her bookkeeper and friend. Defendant mentioned she had an investment company and told Munoz a gentleman from out of town needed $50,000 to start a business. Defendant also told Munoz she could get her principal back on 30 days notice. In December 2003, Munoz gave defendant a check for $50,000. There was a contract which Munoz's husband signed, but defendant's secretary would not give them a copy of the contract. Munoz trusted defendant and thought it was a legal business.

Thereafter, whenever Munoz went to defendant's office, defendant was not there. Munoz did not receive her interest payments for January or February. She did receive checks for April, May and June. Eventually, the IRS began looking for Munoz, so she hired another accountant. She suffered a stroke over the situation with defendant; her husband had not wanted to make the investment. She later found some of her paperwork scattered near Lodi Lake.

Defendant was convicted of sale of securities by false statement (count 13) and grand theft (count 14). In addition, the jury found an aggravated white collar crime enhancement.

The theft charges were related felonies involving the taking of over $500,000. (Pen. Code, § 186.11, subd. (a)(2).)

Securities Expert

Douglas Gooding, senior corporations counsel for the Department of Corporations, testified as to what constituted a security. He testified a security is an investment of money in a common enterprise with the expectation of profit to be derived from the services, skill, expertise or success of the person receiving the money. An investment contract is a security; it need not be in writing. The key is whether the investor turns money over to another because that person has expertise, skill, a plan or connections to derive a profit. The objective of the Department of Corporations was to protect the public from fraud and to promote full and fair disclosure. It was a violation of Corporations Code section 25401 to offer or sell a security with an untrue statement or the omission of a material fact. The core of securities law was to provide information to evaluate risk. Taking money from one investor to pay another was a classic Ponzi scheme and the failure to disclose it was a violation of law.

Gooding testified a promissory note can be a security. In his opinion, giving money for a first deed of trust on a house where the documents were fictitious was an investment contract or security. The reality of the transaction was that the investor was relying on the skill of the person who took the money. A note secured by a genuine mortgage was not a security. The four considerations in determining whether something was a

security were: (1) raising money for a common enterprise; (2) common trading of the instrument; (3) reasonable expectations of the investing public; and (4) whether another regulatory scheme reduced the risk of investment rendering application of securities law unnecessary.

DISCUSSION

I. *Sufficiency of the Evidence -- Count Six*

Were the Howard Transactions Securities?

Defendant contends there is insufficient evidence to sustain the conviction on count six, the sale of securities to Howard based on a false statement or material omission. This count was based on the two transactions in which Howard agreed to lend money in return for promissory notes purportedly secured by first deeds of trust on property owned by the Cunninghams and the Brachnas. Defendant contends there is insufficient evidence these transactions were securities.

Under Corporations Code section 25401, it is unlawful to offer or sell a security by oral or written communication which includes an untrue statement of material fact or omits a material fact necessary to make the statements not misleading. Corporations Code section 25019 defines "security" expansively by listing numerous transactions and instruments deemed to be securities; the list includes notes and investment contracts.

In determining whether a transaction is an investment contract, and thus a security, California courts apply two distinct tests: the "risk capital" test and the federal test.

(*Reiswig v. Department of Corporations* (2006) 144 Cal.App.4th 327, 334.) A transaction is a security if it meets either test. (*Ibid*.)

"The 'risk capital' test requires a consideration of the following factors: (1) whether funds are being raised for a business venture or enterprise; (2) whether the transaction is offered indiscriminately to the public at large; (3) whether the investors are substantially powerless to effect the success of the enterprise; and (4) whether the investors' money is substantially at risk because it is inadequately secured. [Citation.]" (*Moreland v. Department of Corporations* (1987) 194 Cal.App.3d 506, 519.)

"Under the federal test, an investment contract consists of an investment of money in a common enterprise with the expectation of profits produced by the efforts of others. [Citations.] This test is a 'flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.' [Citation.]" (*Reiswig v. Department of Corporations, supra,* 144 Cal.App.4th at p. 335.)

The People relied on the federal test to establish the Howard transactions were securities. Gooding testified a security is an investment of money in a common enterprise with the expectation of profit to be derived from the services, skill, expertise or success of the person receiving the money. The jury was instructed the test for a security "is whether a

person has invested in a common enterprise with the expectation of deriving profits from the efforts of others. 'Common enterprise' means an enterprise in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment of third parties. By efforts of others, I mean those essential managerial efforts which affect the failure or success of the enterprise."

Defendant contends the Howard transactions were not securities because there was no investment in a common enterprise. She contends Howard was looking only to the Cunninghams and the Brachnas for his investment income, with their property as adequate security. She contends Howard was not dependent on her skill or expertise.

As Gooding testified, the usual case of a loan evidenced by a promissory note secured by the deed of trust on real property is not a security. But the investment defendant offered Howard was different from the usual note and deed of trust in important respects. Defendant solicited the investment through her investment company. Howard's checks were made payable to Kenefick Investments, not to the borrower or the title company. Defendant selected the properties, referring to the borrowers as friends. She agreed to handle all the paperwork, including any foreclosures, and brought the documents to Howard for his signature. Defendant told Howard the first investment would be in partnership with her. Significantly, defendant guaranteed Howard would receive his interest payments even if the borrower

defaulted. Thus, Howard was relying on defendant, not the borrowers, for his payments.

"In reviewing the sufficiency of the evidence, we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] '[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence-that is, evidence which is reasonable, credible, and of solid value-such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We '"presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 509.)

From this evidence the jury could have found that Howard was relying on defendant's skill and managerial expertise in making his investment. Indeed, she guaranteed his rate of return regardless of whether the purported borrowers paid on the note. With this guarantee, Howard was looking to and relying on defendant for his profit. Substantial evidence supports finding the Howard transactions were securities.

II. *Substantial Evidence -- Counts One and Four*

Did Defendant Know Kosta and Howard Were over 65?

Defendant contends there was insufficient evidence to sustain counts one and four, elder theft. The crime of elder

theft requires that the victim be at least 65 years old and that the defendant know or reasonably should know that his victim is an elder. (Pen. Code, § 368, subd. (g) & (d).) Specifically, defendant contends there was no evidence she knew or should have known that Kosta and Howard were at least 65 years old at the time of the thefts.

In *People v. Smith* (1993) 13 Cal.App.4th 1182, the 67-year 9-month-old victim was getting into her car at a supermarket parking lot when the defendant shoved her into the passenger seat, telling her that he had a gun and she should comply with his demands. (*Id.* at pp. 1184- 1185.) In stealing the victim's purse, defendant called her "'old lady'" and "'old woman.'" (*Id*. at p. 1185.) A witness described the victim as "'an older lady'" and as an "'elderly lady.'" (*Ibid*.) At trial, the prosecuting attorney noted for the record that the victim had gray hair, but none of her other physical characteristics was put on the record. The *Smith* court concluded that sufficient evidence existed to support the age enhancement because there was evidence of her chronological age and her "physical appearance [was] before the jury." (*People v. Smith, supra*, at p. 1190.) Thus, "the jury could reasonably deduce from its view of [the victim's] physical appearance that defendant reasonably should have known that she was at least 65 years old." (*Ibid*.)

Here both Kosta and Howard testified before the jury and gave their birth dates. Kosta was born May 7, 1934, and was 68 in January 2003 when he gave defendant money believing he was investing in a housing development in Ripon and making a loan on

a policeman's house. Howard was born September 5, 1936. He was 64 years old at the first investment in June 2001 and 65 at the second investment in December 2001.

Defendant contends, unlike in *People v. Smith, supra,* 13 Cal.App.4th 1182, the jury could not deduce from Howard and Kosta's physical appearance that defendant should have known their ages because the trial took place in January 2007, several years after the offenses. The jury would have to speculate as to how Howard and Kosta looked years earlier. However, unlike the victim in *Smith*, Kosta and Howard were not strangers to defendant. Defendant had known Kosta since 1999 and did his taxes. She knew Howard for 12 years. She was not only his accountant, but also socialized with him. He told her the money he had to invest was in IRA's for his retirement and he needed the interest to live on in retirement. Defendant's long association with her victims and her knowledge of their financial affairs gave the jury a basis for concluding she should have known they were 65 years old or older.

III. *Expert Testimony on the Ultimate Fact*

Was It Proper to Permit Tankersley to Testify Defendant Operated a Ponzi Scheme?

Defendant contends it was error to permit the forensic accountant to testify that defendant was operating a Ponzi scheme. Defendant contends this testimony went to the ultimate issue and was tantamount to an expert opinion that defendant was guilty of theft and fraud. Recognizing there was no objection below to this testimony, defendant contends counsel was

ineffective in failing to object and the admission of this expert testimony denied her due process of law.

An expert may testify in the form of an opinion as to "a subject that is sufficiently beyond the common experience" such that the expert's opinion "would assist the trier of fact[.]" (Evid. Code, § 801, subd. (a).) Expert testimony is admissible even though it is directed to an ultimate fact which must be decided by the jury. (Evid. Code, § 805.) The decision of a trial court to admit expert testimony "will not be disturbed on appeal unless a manifest abuse of discretion is shown." (*People v. Kelly* (1976) 17 Cal.3d 24, 39.)

"'[T]he admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness."' [Citation.]" (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300.)

Unquestionably, Tankersley's testimony "assisted" the jury. The key question at trial was what defendant did with the money from her investors. While jurors have some experience with financial matters, such as balancing checkbooks, the volume of

financial information in this case was overwhelming. There were 11 binders, each three to four inches thick, of cancelled checks and bank statements. Tankersley waded through the mountains of cancelled checks and bank statements, tracing 90 percent of the money. She was able to testify where it went; it went primarily to the benefit of defendant and none of it was invested in real estate or businesses as promised.

Tankersley prepared several exhibits to explain what defendant did with her investors' money. Exhibit 37 was a chronological listing of all deposits and expenditures from Kenefick Investments. The exhibit showed, for example, that after Carolyn Valencia invested $40,000, defendant paid off a personal $50,000 line of credit. Significantly, the detailed listing of expenditures shows no investment of the substantial sums received from the investors. Exhibit 38 detailed the transactions by each victim. Exhibit 39 summarized these transactions, showing how much each victim invested and how much they received. For example, Brachna invested $165,000 and received back $70,583.57, and Howard invested $160,000 and received $55,832.16. Kosta invested $275,000, but received only $9,360. Tankersley testified the transactions she examined showed very clear examples of a Ponzi scheme as the investors' money was used for defendant's benefit or to pay interest to investors, but was not invested.

Defendant contends Tankersley's testimony about a Ponzi scheme was improper and was similar to testimony found

inadmissible in *People v. Torres* (1995) 33 Cal.App.4th 37, and *People v. Killebrew* (2002) 103 Cal.App.4th 644. We disagree.

In *People v. Torres, supra,* 33 Cal.App.4th 37, defendant was found guilty of first degree murder with a robbery special circumstance. On appeal, he contended he committed at most attempted extortion. (*Id*. at p. 42.) A police officer who was an expert on gangs testified about the gang practice of collecting "rent" from drug dealers who sold in the gang's territory. No error was assigned to this testimony. On redirect, however, the officer testified as to his understanding of robbery and extortion and opined that robbery was "'what happened in this particular case.'" (*Id*. at p. 44.) The appellate court found this testimony was inadmissible; it was the court's job to instruct the jury on the law, not the officer's, and the jury was as competent as the witness to weigh the evidence and draw a conclusion. (*Id*. at pp. 46-47.) The court found the error in admitting the testimony, and defense counsel's failure to object, was harmless because the evidence clearly showed attempted robbery and not extortion. (*Id*. at pp. 48-52.)

In *People v. Killebrew, supra,* 103 Cal.App.4th 644, a police officer testified about gangs and gang psychology. He also testified that when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and constructively possesses it. (*Id*. at p. 652.) The appellate court found admission of this evidence was reversible error. Testimony about subjective knowledge and intent was improper

expert testimony; it served merely to inform the jury how the officer believed the case should be decided and usurped the factfinding role of the jury. (*Id*. at p. 658.)

In both *Torres, supra,* 33 Cal.App.4th 37, and *Killebrew, supra,* 103 Cal.App.4th 644, the officer testified as to his opinion how the case should be resolved, opining as to the interpretation of the law or defendant's subjective knowledge and intent. Here, by contrast, Tankersley did not give an opinion about resolution of the case. Instead, she testified what her examination of the paper trail revealed as to where the investors' money went. Defendant was not charged with running a Ponzi scheme; she was charged with theft and securities fraud. Tankersley's testimony assisted the jury in making sense of the mountain of paperwork. That once the jury saw what happened to the investors' money it would convict defendant of the charges, reflects the strength of the prosecution's case rather than impermissible expert testimony.

IV. *Forgery - Counts 9,10, 17 and 18*

Was Defendant Properly Convicted of Four Counts of Forgery?

Relying on *People v. Ryan* (2006) 138 Cal.App.4th 360, defendant contends there can be only one count of forgery per instrument. Accordingly, she asserts, one count of counts 9 and 10 and one count of counts 17 and 18 must be vacated. We agree.

Defendant was charged with four counts of forgery under Penal Code section 470, subdivision (a). Penal Code section 470, subdivision (a) provides: "Every person who, with the

intent to defraud, knowing he or she has no authority to do so, signs the name of another person or of a fictitious person to any of the items listed in subdivision (d) is guilty of forgery." Subdivision (d) lists a promissory note as one of the documents. Each count alleged defendant "did willfully and unlawfully with the intent to defraud, and knowingly without authority to do so, sign the name of another person and of a fictitious person, to" followed by the name of the person whose signature was forged. Count 9 was Kristina Brachna; count 10 was Alejandro Gonzalez; count 17 was Dennis Cunningham; and count 18 was Susan Cunningham. The forged documents were the promissory notes. These notes, along with a deed of trust and lender's escrow instructions, were presented to Howard to show his investment was secured.[1]

In *People v. Ryan, supra*, 138 Cal.App.4th 360, defendant was convicted of four counts of forgery: two under Penal Code section 470, subdivision (a) and two under subdivision (d), which makes it a crime to make, alter, forge, counterfeit or pass as true and genuine any of certain documents. Counts V and VII were based on defendant signing Cynthia Carter's name to a check and using it to make a purchase at Staples. Counts VI and VIII were based on signing Carter's name to another check and attempting to use it to make a purchase at Gypsy Rose Antiques.

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[1] Exhibit 30B includes a page from a deed of trust purportedly given by the Brachnas. The page is not signed.

(*Id*. at p. 364.) Defendant contended she could not be convicted of counts V and VI and the appellate court agreed. (*Ibid*.)

Previously, the various acts constituting forgery were not set forth in different subdivisions, but "were amassed in an undifferentiated, confusing recitation." (*People v. Ryan, supra,* 138 Cal.App.4th at p. 364.) The cases held there was but one act of forgery even though multiple acts were committed with respect to the same instrument. (*Id*. at p. 366.) Thus, in *People v. Frank* (1865) 28 Cal. 507, the court noted forgery could be committed in various ways including falsely making, altering, counterfeiting, and passing. "Now, each of these acts singly, or all together, if committed with reference to the same instrument, constitute but one offense. Whoever is guilty of either one of these acts is guilty of forgery; but if he is guilty of all of them, in reference to the same instrument, he is not therefore guilty of as many forgeries as there are acts, but of one forgery only." (*Id*. at p. 513.) In *People v. Leyshon* (1895) 108 Cal. 440, defendant forged two names to a promissory note and then passed it as genuine. There was but one offense. (*Id*. at pp. 442-443.)

The rule of one count of forgery per instrument is in accord with the essence of forgery, which is making or passing a false document. "The crime of forgery as denounced by statute (Pen. Code, § 470) consists of either of two distinct acts-the fraudulent making of an instrument, such as a false writing thereof, or the uttering of a spurious instrument by passing the same as genuine with knowledge of its falsity [citation]; and

although both acts may be alleged in the conjunctive in the same count in the language of the statute, the offense does not require the commission of both-it is complete when one either falsely makes a document without authority or passes such a document with intent to defraud [citations], and the performance of one or both of these acts with reference to the same instrument constitutes but a single offense of forgery. [Citation.]" (*People v. Luizzi* (1960) 187 Cal.App.2d 639, 644.)

The *Ryan* court found the 1998 revision of Penal Code section 470, did not change the law, but was intended simply to make the laws governing financial crimes more "user friendly." (*People v. Ryan, supra,* 138 Cal.App.4th at pp. 366-367.) We conclude that the doing of one or more of the proscribed acts, with respect to the same instrument, constitutes but one offense. (*Id*. at p. 367.) The court vacated the convictions on counts V and VI. (*Id*. at p. 372.)

In *People v. Martinez* (2008) 161 Cal.App.4th 754, the court held forging two signatures on a deed of trust constituted only one count of forgery under Penal Code section 470, subdivision (d). The court made clear its holding was limited to multiple convictions under subdivision (d) of Penal Code section 470 and left open the question whether multiple convictions were permissible under subdivision (a) or (b). (*Id*. at p. 762, fn. 3.) Since those subdivisions made it a crime to sign another person's name, "it is at least arguable that these subdivisions are violated each time a person makes and/or passes a forged signature, even if only a single document is involved." (*Ibid*.)

We believe this question was answered in *Ryan*, which held the revision of Penal Code section 470 did not change the law. "The overhaul of section 470 . . . was not intended to 'change the meaning or legal significance of the law,' but '"merely [to] organize[] the relevant code sections into a cohesive and succinct set of laws that can be readily referred to and understood."' [Citation.]" (*People v. Ryan, supra,* 138 Cal.App.4th 360, 366.) Thus, the old rule of one count of forgery per document continues and there cannot be multiple convictions based on any subdivision of Penal Code section 470 where only one document is involved.

In arguing the multiple convictions are proper, the Attorney General claims defendant forged signatures on multiple documents, notes, deeds of trust, and escrow instructions and the forged signatures included that of her husband. Defendant was not charged with forging the signature of her husband, only those of Brachna, Gonzales, and the Cunninghams. As noted above, the only documents with these forged signatures were the two notes.

Since there were only two forged documents, there can be but two counts of forgery. We vacate the convictions for counts 10 and 18.

V. *Penal Code Section 654*

Should the Sentences on Counts 9 and 17 be Stayed?

Defendant contends she could not be punished separately for forgery in counts 9 and 17 because the forgeries were part and

parcel of the theft, securities fraud, and burglary. She had a single criminal intent -- to take Howard's money. We agree.

Penal Code section 654 prohibits multiple punishment for a single act or omission which may be "punishable in different ways by different provisions" of the Penal Code. Section 654 applies not only where there is but one "act" in the ordinary sense, but also where there is an indivisible course of conduct. (*People v. Beamon* (1973) 8 Cal.3d 625, 637.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, affirmed in *People v. Latimer* (1993) 5 Cal.4th 1203, 1205.) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

In *People v. Curtin* (1994) 22 Cal.App.4th 528, defendant was convicted of burglary and forgery after he entered a bank and cashed a forged check. On appeal the Attorney General conceded sentence on the forgery count should be stayed under section 654 because the forgery and burglary were part of an

indivisible transaction, committed with a single criminal intent of cashing the check. (*Id*. at p. 532.)

Defendant contends she harbored a single criminal objective in committing forgery and theft, securities fraud and burglary with respect to the Howard transactions; the single criminal intent was to steal Howard's money. She contends the forgery was simply the means by which she accomplished her theft.

The Attorney General notes that the crime of forgery, unlike theft, is not concerned with the end (the taking), but the means (signing another's name). (*People v. Neder* (1971) 16 Cal.App.3d 846, 852-853.) The Attorney General contends defendant used forgery not simply to take Howard's money but also to conceal her theft and fraud. Further, her first forgery of the Cunningham documents permitted her to commit the second theft involving the Brachna note. The Attorney General relies upon *People v. Kronemyer* (1987) 189 Cal.App.3d 314. We find that case distinguishable.

In *People v. Kronemyer, supra,* 189 Cal.App.3d 314, an attorney stole from an elderly client and subsequently committed perjury in conservatorship accountings. The court held section 654 did not bar punishment on both the theft and perjury charges. The perjury had a separate criminal objective of obtaining appointment as conservator of the client's estate. (*Id*. at p. 367.) "It is only tangential to his ability to conceal the already completed thefts of the savings accounts." (*Id*. at p. 368.) The court distinguished *Burris v. Superior Court* (1974) 43 Cal.App.3d 530, where defendant was convicted of

perjury, unlawful practice of law and grand theft. "There, there was but one objective, to steal, and the perjury and unlawful practice of law were merely preliminary steps in the plan toward that goal." (*Kronemyer, supra*, at p. 368.) This case is like *Burris*; the forgeries were preliminary steps in the plan to steal Howard's money.

Sentence on counts 9 and 17 should be stayed.

DISPOSITION

The convictions on counts 10 and 18 are vacated and the sentence on counts 9 and 17 is stayed. In all other respects, the judgment is affirmed. The trial court is ordered to prepare a new abstract of judgment reflecting these changes and to forward it to the Department of Corrections and Rehabilitation.

MORRISON, Acting P. J.

We concur:

ROBIE, J.

CANTIL-SAKAUYE, J.